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JIDE NZELIBE AND JOHN YOO

## Rational War and Constitutional Design

**ABSTRACT.** Contemporary accounts of the allocation of war powers authority often focus on textual or historical debates as to whether the President or Congress holds the power to initiate military hostilities. In this Essay, we move beyond such debates and instead pursue a comparative institutional analysis of the relationship between Congress and the President on war powers. More specifically, we ask which war powers system would best enhance the effectiveness of the United States in making decisions about war and peace? First, we suggest that the argument that a Congress-first approach will have clear political accountability and accuracy advantages over a President-first approach rests on questionable empirical and theoretical assumptions. Second, we turn to the international dimension and draw on one of the few facts considered to be close to an empirical truth in international relations: Democracies do not tend to go to war with each other. Here, we explore the relationship between the regime type of the adversary and the war powers system best suited to combating it. We argue that if the United States were involved in a dispute with another democracy, involving Congress could help facilitate a peaceful resolution by allowing the United States to signal more effectively its intentions. If, however, the United States were involved in a dispute with a nondemocracy or a terrorist organization, a unilateral presidential approach would make more sense because such an opponent is less likely to have the proper incentives to respond to the signal conveyed by congressional participation. Finally, we conclude that only an approach that vests exclusively in the President the discretion to seek *ex ante* congressional authorization would permit the United States to adapt its domestic decision-making structure to the exogenous demands of the international system.

**AUTHORS.** Jide Nzelibe is Assistant Professor of Law, Northwestern University Law School. John Yoo is Professor of Law, University of California at Berkeley School of Law (Boalt Hall), and Visiting Scholar, American Enterprise Institute. This Essay benefited from comments received at a conference on rational choice and constitutional law at Boalt Hall and faculty workshops at the University of Minnesota Law School, Yale Law School, and Vanderbilt University Law School. We appreciate the comments of Robert Cooter, William Eskridge, Dan Farber, Andrew Guzman, John McGinnis, Michael Paulsen, Eric Posner, Cass Sunstein, and Adrian Vermuele.



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## INTRODUCTION

The issue of war powers, more specifically the question of whether the President or Congress holds the power to initiate military hostilities, remains one of the most controversial and unsettled areas of constitutional law. American Presidents have long claimed the authority to initiate military hostilities unilaterally, and since at least the Korean War, they have taken the nation into war without congressional authorization beyond legislative funding. In 1973, Congress enacted a War Powers Resolution that sought to place a sixty-day limit on military intervention, but Congress has never enforced it. Remaining silent, the Supreme Court has not taken a case since the Civil War-era *Prize Cases*<sup>1</sup> on whether a war waged without congressional authorization violates the Constitution.

And in yet another re-run of Vietnam, the question of war powers has returned as a focus in the argument over the Iraq War. Both public supporters and critics of the intervention have argued that Congress should have declared war against Iraq.<sup>2</sup> Nonetheless, such arguments (which did not appear in any significant way before the March 2003 invasion) did not appear to hold any sway with Congress, which authorized the attack by statute but not by a declaration of war,<sup>3</sup> nor with the federal courts, which turned away a challenge to the constitutionality of the Iraq War.<sup>4</sup>

Division over the extent of the President's and Congress's war powers is mirrored, if not sharpened, in the legal academy. Prominent academics, such as John Hart Ely, Harold Koh, Louis Fisher, Louis Henkin, and Michael Glennon, believe that Congress must authorize all uses of force abroad (the "Congress-first approach"), except in self-defense.<sup>5</sup> A minority, including Judge Robert Bork, Eugene Rostow, and John Yoo, has countered that the Constitution

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1. 67 U.S. (2 Black) 635 (1863).

2. See, e.g., Andrew J. Bacevich, Op-Ed., *War Powers in the Age of Terror*, N.Y. TIMES, Oct. 31, 2005, at A19; Leslie H. Gelb & Anne-Marie Slaughter, Op-Ed., *No More Blank-Check Wars*, WASH. POST, Nov. 8, 2005, at A19; Susan J. Tolchin, Op-Ed., *Chicken Congress AWOL from Battle*, L.A. TIMES, Oct. 9, 2005, at M6.

3. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

4. *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing as non-justiciable a suit seeking an injunction to prevent the President and Secretary of Defense from initiating war with Iraq).

5. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-4 (1993); LOUIS FISHER, *PRESIDENTIAL WAR* 11 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 26 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990).

allows the President to order the initiation of military hostilities unilaterally (the “President-first” approach).<sup>6</sup> Nevertheless, both sides in the debate measure current practice against the constitutional text or original understanding of the document. This Essay addresses the debate from a different perspective, one beyond the formal textual and historical sources of constitutional law. Instead of defending the legitimacy of or justification for a constitutional reading, we pursue a comparative institutional analysis of the relationship between the President and Congress. We ask the question: What war powers system would enhance the effectiveness of the United States in making decisions about war and peace?

In Part I, we discuss the functional purposes for a warmaking system. We explore the Congress-first position’s implicit normative commitments and ask whether they are met in practice. Part II then examines the Congress-first and President-first approaches along two domestic aspects—political accountability and accuracy—and finds that the Congress-first approach has no clear advantages in either.

Part III turns from the domestic to the international. It argues that, under certain circumstances, the international bargaining position of the United States is improved if the President receives *ex ante* authorization for warmaking from Congress. Our analysis draws on what is thought to be the one empirical truth about international conflict: Democracies do not go to war with each other.<sup>7</sup> Until recently, scholars have devoted little attention to how the nature of adversaries’ regimes—whether democratic or nondemocratic—might affect the optimal allocation of war powers. This Part uses the political science literature on the democratic peace to develop a functional argument for a more flexible allocation of war powers. The regime type of a potential opponent may determine whether adopting a Congress-first or President-first

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6. See Robert H. Bork, *Erosion of the President’s Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698 (1990); Robert H. Bork, *Foreword to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH*, at ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).
  7. The political science literature on the democratic peace is vast. For leading examples, see DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR* (2002); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993); Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999); David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992); and Zeev Maoz & Nazrin Abdolali, *Regime Types and International Conflict, 1816-1976*, 33 J. CONFLICT RESOL. 3 (1989). But see Michael C. Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, INT’L SECURITY, Fall 2002, at 5; Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 AM. POL. SCI. REV. 585 (2003).

approach to war powers is more effective. We argue that when the United States' foreign adversary is a democracy, prior legislative authorization can serve an important signaling function. That signal, however, is likely to be diluted when the adversary is a nondemocratic state or terrorist organization. Given the political judgments inherent in deciding when such a signal might be appropriate, we conclude that the courts should have no role in the process; instead, the decision to seek congressional authorization for the use of force should rest with the President.

## I. FUNCTIONAL PURPOSES OF THE WARMAKING SYSTEM

This Part briefly reviews some of the normative claims that underpin the competing war powers theories and asks whether they align with the purposes that war has served in American history. In particular, it asks whether the Congress-first model for deciding on war has produced the tangible benefits predicted by its proponents.

Contemporary textual and historical arguments about war powers have reached a stalemate. While some Congress-first scholars believe that the intent of the Framers is clear,<sup>8</sup> opponents of that position argue that the constitutional text and structure do not bear out that understanding.<sup>9</sup> If the Constitution does not unequivocally demand a specific warmaking process, or if the ambiguity in the interpretive sources prevents any definitive conclusions, then functional considerations may be particularly useful in determining the superior system.

One perceived advantage of the Congress-first approach is that it slows down the warmaking process, which in turn prevents imprudent wars that may be too costly and ineffective. As Ely stated, "[T]he point was not to exclude the executive from the decision—if the president's not on board we're not going to have much of a war—but rather to 'clog' the road to combat by requiring the concurrence of a number of people of various points of view."<sup>10</sup> Several younger scholars, including Michael Ramsey, Jane Stromseth, and William

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8. See, e.g., ELY, *supra* note 5, at 3 ("The [framing] debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not—most weren't, even then—had to be legislatively authorized.") (footnotes omitted).

9. See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 55-181 (2005) (arguing that the best reading of the constitutional text, structure, and history does not establish any fixed method of going to war, akin to the process set out for the enactment of legislation, but instead permits the political branches to either cooperate or conflict in making decisions about war).

10. ELY, *supra* note 5, at 4 (footnote omitted).

Treanor, have provided more elaborate defenses of this functional approach by delving further into the Framing history.<sup>11</sup> This approach is appealing because it bears close similarity to the process that governs the enactment of ordinary legislation. It promises the deliberation, consensus, and clarity prized by the new legal process approaches that recently have influenced thinking about legislation and administrative law.<sup>12</sup>

But before accepting this seemingly attractive vision, we should ask whether the Congress-first system lives up to its promises. In other words, has requiring congressional ex ante approval for foreign wars produced less war, better decision-making, or greater consensus? A cursory review of previous American wars does not suggest that requiring congressional authorization before the use of force invariably produces better decision-making. For example, the declarations of war initiating the Mexican-American and Spanish-American Wars did not result from extensive deliberation or necessarily result in good policy.<sup>13</sup> Although both wars benefited the United States by expanding the nation's territory and enhancing its presence on the world stage,<sup>14</sup> they remained offensive wars of conquest. Nor is it clear that congressional participation has resulted in greater consensus. Congress approved both the Vietnam and the 2003 Iraq Wars, but both have produced sharp divisions in American domestic politics.

Much of the war powers literature focuses on the concern that the United States might erroneously enter a war in which the expected costs outweigh the expected benefits. Statisticians usually label such errors of commission Type I errors. However, the other side of the coin is just as important. Errors of

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11. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993); William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 700 (1997).
  12. See William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).
  13. On the Mexican-American War, see DAVID M. PLETCHER, *THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR* (1973). On the Spanish-American War and the events leading up to it, see ERNEST R. MAY, *IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER 196-262* (1961); and H. WAYNE MORGAN, *AMERICA'S ROAD TO EMPIRE: THE WAR WITH SPAIN AND OVERSEAS EXPANSION* (1965).
  14. See WALTER A. MCDUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776*, at 117-21 (1997) (evaluating the significance of the Spanish-American War); see also AKIRA IRIYE, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, VOLUME III: THE GLOBALIZING OF AMERICA, 1913-1945*, at 34-35 (1993); WALTER LAFEVER, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, VOLUME II: THE AMERICAN SEARCH FOR OPPORTUNITY, 1865-1913*, at 180 (1993).

omission, when the United States does not enter a conflict whose expected benefits outweigh the costs, are called Type II errors and may be just as undesirable as Type I errors.<sup>15</sup> But scholars rarely, if ever, ask whether requiring congressional *ex ante* approval for foreign wars could increase the likelihood of Type II errors. Legislative control could prevent the United States from entering into wars that would advance its foreign policy or national security objectives. The clearest example is World War II. During the inter-war period, Congress enacted several statutes designed to prevent the United States from entering into the wars in Europe and Asia. In 1940 and 1941, President Franklin D. Roosevelt recognized that America's security would be threatened by German control of Europe, and he and his advisers gradually attempted to bring the United States to the assistance of Great Britain and the Soviet Union.<sup>16</sup> Nonetheless, congressional resistance delayed entry into the war and prevented Roosevelt from doing anything more than supplying arms and loans to the Allies and providing partial protection for convoys to Great Britain. In hindsight, most would agree that America's earlier entry into World War II would have benefited both the United States and the world.

We must compare the impact of Type I and Type II errors under a Congress-first system with the results of a President-first approach. Presidents may cause the United States to begin wars that appear unnecessary or unwise initially; however, some of these conflicts may look better in hindsight. The Cold War experience, which provides the best examples of major military hostilities conducted without *ex ante* congressional authorization, does not stand as an unambiguous example of how legislative control promotes institutional deliberation and results in better conflict selection. Many of the conflicts, such as Panama and Grenada, ended successfully for the United States. To be sure, the Korean War, which many would consider a draw, did not, but the Korean War may have succeeded in its broader objectives of containing the expansion of communism in East Asia.

Statements defending congressional approval of military hostilities, in effect, argue that congressional authorization produces deliberation, consensus, and good selection of wars. However, there is little or no empirical data to support this conclusion, and some of the best known anecdotes from the historical record point in the other direction. If empirical data on American wars would be too difficult to analyze, perhaps we should proceed along a different line, by constructing better models of state behavior in the

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15. See ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 175-77 (1997) (discussing the differences between Type I and Type II errors).

16. For a standard historical source on the period, see ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945* (1979).

international system to judge the efficacy of warmaking arrangements. We do not claim that the empirical record shows that a President-first approach is always superior. We argue that the Congress-first approach is based on unproven and questionable assumptions, and that as a matter of theory an approach that allows the President to choose whether to seek congressional support for war will be superior. We do not attempt to provide new empirical analysis here, but we will show as a matter of theory why the Congress-first approach does not provide the benefits claimed by its proponents.

## II. THE DOMESTIC LEVEL

We propose three central criteria against which to evaluate the Constitution's process for making war. Two of them—political accountability and expertise or accuracy in making decisions—relate to domestic factors and should not come as any surprise to public-law scholars who study domestic policymaking in the modern administrative state. We ask whether the pro-President or pro-Congress view better protects against agency slack. In Part III, we turn our analysis to a third criterion, effective signaling at the international level, which has gone mostly unstudied by legal scholars.

### A. Political Accountability

A significant number of scholars have argued that the President remains more politically accountable than other institutions. Indeed, much of the current work on the separation of powers commonly assumes that the President answers to a “national constituency,” while Congress usually looks to “parochial interests.”<sup>17</sup> Critics of the majoritarian President, on the other hand, emphasize that the Electoral College's winner-take-all system gives the President an incentive to cater to a narrower political constituency than the median legislator.<sup>18</sup> Despite these varying views on the accountability of the political branches, one can reasonably conclude that presidential accountability will become more pronounced in matters of foreign policy and national

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17. See, e.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 157 (1997); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 58-70 (1995); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 *DUKE L.J.* 1180, 1193-95 (1994).

18. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217 (2006); see also Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 *FLA. ST. U. L. REV.* 109, 128-29 (2000).



security. In foreign affairs, the Constitution's Framers indisputably attempted to suppress the parochial interests that had beset the Articles of Confederation. They centralized authority over national security, foreign policy, and international trade in the national government.<sup>19</sup> Over time, control over those issues has migrated to the executive branch, a fact that even critics of the "imperial presidency" recognize.<sup>20</sup> More importantly, Presidents are often identified with the nation's successes or failures in foreign policy, and they will bear the lion's share of the electoral consequences of victory or defeat in war.<sup>21</sup>

The benefits of delegating war power to the executive might be outweighed by a variety of agency costs. The President, for example, might wish only to satisfy the majority necessary to elect him, which could constitute as little as twenty-five percent of the population (the fifty percent of the states with fifty percent of the electoral votes).<sup>22</sup> Alternatively, the President might be a lame duck in his second term, or he might have a short time horizon that extends only to the next election. A President might use war as a pretext to expand his powers, which he could misuse for domestic purposes.<sup>23</sup> Finally, a President might seek personal glory in war rather than the national interest.

Arguments in favor of a requirement that Congress first authorize war, however, do not explain how congressional participation would reduce these agency costs. If Congress seeks to represent the median voter, as some theories of legislation suggest, then it is unclear that Congress's constituency is any broader than the President's. The median member of the House of Representatives could represent a constituency that is as little as twenty-five

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19. See FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

20. KOH, *supra* note 5, at 118-23; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at viii-ix (1973).

21. The President's electoral accountability for failed military engagements deserves special attention. A common theme that runs throughout the Congress-first literature is that Presidents might be particularly disposed to seek positive electoral rewards or glory from initiating international conflicts. But the electorate is equally as likely to hold the President accountable for failed military engagements or stalemates. One need only look to Lyndon Johnson's political fate in 1968. Because of the unpredictable electoral risks associated with initiating conflicts, some political scientists have argued that Presidents are unlikely to initiate conflicts immediately prior to a national election. See DAVID P. AUERSWALD, *DISARMED DEMOCRACIES: DOMESTIC INSTITUTIONS AND THE USE OF FORCE* 20 (2000).

22. See Nzelibe, *supra* note 18, at 1234.

23. This was a particular fear of the Framers, who believed that the Crown had used war to expand its influence over Parliament. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 198, 208-12 (1996).

percent of the electorate.<sup>24</sup> The constitutional allocation of Senate seats might bias Congress toward the interests of rural areas. Congress might be just as susceptible as the President to the temptation of using war as a pretext to expand its domestic powers. During the McCarthy era, members of Congress, rather than the executive branch, pressed to reduce civil liberties because of national security concerns. Congress also might have objects in mind that have more to do with national glory than with the real interests of the electorate. The War of 1812 centered more on the congressional dream of adding Canada to the American republic than on national self-defense or presidential ambitions.<sup>25</sup>

The choice between the Congress-first view and the current system of war powers is not one of total versus zero congressional participation. The question really is one of *ex ante* versus *ex post* participation. Even under the strongest President-first theories, Congress still retains the ability to check presidential foreign policy and national security decisions through the funding power. Often Congress can exercise that authority *ex ante*. It had the opportunity, for example, to prevent Presidents from waging the Persian Gulf War, the Kosovo conflict, and the wars in Afghanistan and Iraq by refusing to appropriate money before the fighting began. Some Congress-first scholars doubt the effectiveness of Congress's appropriation power in constraining presidential military ventures,<sup>26</sup> but Congress has frequently used the threat to cut off funding to force withdrawal of forces and terminate conflicts.<sup>27</sup> With the high costs of modern conflict, any significant military undertaking will require Presidents to seek congressional cooperation. Critics of presidential power fail to explain why political accountability would be enhanced by requiring that Congress not just provide funding for military hostilities *ex ante*, but also go to the additional step of enacting legislation authorizing the conflict.

24. See Nzelibe, *supra* note 18, at 1239.

25. See, e.g., 1 BERNARD BAILYN ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 364-65 (4th ed. 1992) (discussing the activities of the Republican "War Hawks" in Congress who supported the War of 1812).

26. See KOH, *supra* note 5, at 133 (arguing that such a safeguard is rarely effective and realistically untenable because an appropriations cutoff in the middle of a war would "expose legislators to charges of having stranded soldiers in the field").

27. See David P. Auerswald & Peter F. Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 520-23 (1997) (citing examples of Congress restraining the President through threats to cut funding and budgetary requirements); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1025-53 (2006) (describing modern case studies, including Lebanon and Somalia, in which Congress coerced the President to withdraw troops through threats to cut off funding).

Suppose, however, that a military conflict is sufficiently low in intensity that its prosecution does not require significant ex ante funding from Congress. Such operations might include, for example, cruise missile strikes against a nation's leadership, as in Libya, or surprise attacks against terrorist bases, as in Sudan. Congress would only have the opportunity to register its disagreement with the President ex post. The question, however, is whether political accountability in this smaller category of conflicts suffers a setback because of Congress's after-the-fact participation. If Presidents remain responsive to a national electorate and voters associate foreign policy successes and failures more closely with Presidents than with individual members of Congress, then ex ante congressional participation must be justified on the ground that Presidents systematically misread the national interest. Ex ante congressional authorization might raise the political profile of an impending war, which might cause the electorate to send clearer signals to their representatives. On the other hand, Presidents presumably would remain just as responsive as members of Congress to changes in voters' preferences. Supporters of the Congress-first approach do not explain how ex ante congressional authorization would improve the national government's representation of the wishes of the electorate.

### B. Accuracy

A second dimension that ought to guide our evaluation of the decision-making process for war is whether the Congress-first model or the President-first model yields more accurate decisions. In many circumstances, considering multiple perspectives can improve the quality of decision-making by elected officials. But it may be that Congress, with all of its peculiar institutional deficits and disabilities, is unlikely to improve decision-making accuracy.

As a preliminary matter, Congress does not seem to have access to better forms of information than the executive branch. It seems that Presidents have more incentive to invest in methods for obtaining better information. For instance, if there is any domestic backlash against erroneous intelligence, the President is more likely to be blamed than members of Congress.<sup>28</sup>

If we again view the President's role as that of an agent acting on behalf of his principals (i.e., the American people), a successful warmaking system

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28. See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 888 (1996) (observing that the public is more likely to hold the President than Congress responsible for national events because of public perceptions that Congress faces a collective action problem).

would encourage the national government to wage war only when it is in the nation's interest. We define the nation's interest as advanced when the United States engages in wars in which the expected benefits of the conflict exceed the expected costs. From the standpoint of institutional design, it seems that the executive branch has critical advantages over a multi-member legislature in reaching foreign policy and national security decisions that are more accurate. As Alexander Hamilton argued in *The Federalist No. 70*, the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and its deliberations: "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."<sup>29</sup>

The executive branch also has access to broader forms of information about foreign affairs than those available to Congress. It has access to foreign policy and national security information produced not only by diplomatic channels, but also by clandestine agents and electronic eavesdropping. In terms of receiving and processing that information, the executive branch is not restricted by the collective action problems that plague a multi-member body like Congress.<sup>30</sup> Since the bulk of the intelligence community works in the executive branch, that branch also devotes more resources to analyzing intelligence information than does the legislature. While Congress may have its own independent staff that analyzes intelligence and foreign information, this staff is dwarfed by the size of the executive branch's intelligence and foreign policy apparatus.<sup>31</sup>

The events leading up to the Iraq War illustrate the difference in resources and capability in intelligence gathering and processing between the executive and legislative branches. As the commission headed by Judge Laurence Silberman and former Senator Charles Robb made clear, the intelligence community was "all wrong" about the existence of weapons of mass destruction (WMD) in pre-war Iraq.<sup>32</sup> This failure resulted from difficulties in

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29. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. See, e.g., Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 162-63 (1999) (arguing that the need for pervasive secrecy makes congressional oversight of intelligence activities very difficult).

31. See *id.* at 162 ("While the Central Intelligence Agency and other intelligence organizations within the government have played key roles in U.S. foreign policy, they have been almost entirely under the control of presidents . . .").

32. Comm'n on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction, Report to the President of the United States 45 (Mar. 31, 2005).

collecting accurate and reliable information on Iraq's WMD programs and shortcomings in analysis by the intelligence agencies.<sup>33</sup> Congress brought no independent collection or analysis of information to bear. Instead, Congress based its decision to authorize the use of force against Iraq on the intelligence and analysis presented by the Bush Administration. Congress does not have the institutional resources to seek alternate sources of information. As a result, the inclusion of Congress, *ex ante*, in the decision to use force did not lead to any greater accuracy in decision-making.

A critic might argue that having two institutions involved in the decision for war, even if both are reading the same facts, would lead to better judgments. This point has an intuitive appeal, although recent efforts at intelligence reform have rejected it in favor of greater centralization.<sup>34</sup> Further, it ignores the problems with the organization and incentives of legislators, both of which make it unlikely that Congress will be willing to make difficult decisions in foreign affairs and national security. David Epstein and Sharyn O'Halloran, for example, have developed a promising theoretical model to explain when Congress will delegate significant discretion to the other branches, particularly to the executive.<sup>35</sup> According to their model, legislators interested in re-election will delegate authority to reduce transaction costs. Epstein and O'Halloran argued that Congress will delegate when the internal inefficiencies of making policy are high (as when committees are outliers to the views of the median member of Congress); when the internal organization of Congress prevents effective bargaining; and when coordination problems prevent the building of coalitions. Congress will also delegate when the President's views are closer to that of the median member of Congress and when uncertainty associated with a certain policy area is high.<sup>36</sup>

A transaction cost approach suggests that Congress will delegate authority over issues that are either informationally complex or in which the consequences of government action are difficult to predict. Congress will choose to retain control over policy when it can target benefits to narrow groups of constituents, as with taxation.<sup>37</sup> William Howell has incorporated

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33. *See id.* at 47.

34. *See id.* at 539; RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005); Anne M. Joseph, *The Architecture of Smart Intelligence: Balancing Unification and Redundancy in Agency Design and Congressional Oversight*, 94 CAL. L. REV. (forthcoming 2006).

35. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 73-77 (1999).

36. *Id.* at 75.

37. *Id.* at 201-03.

this approach into a broader theory of unilateral executive action; he predicts that when Congress is fragmented and suffers from high transaction costs and uncertainty, Presidents are more likely to act unilaterally, whether through constitutional power or delegated rulemaking authority.<sup>38</sup> Congress is unlikely to interfere in decisions to initiate war because it is difficult to predict the costs and benefits of such decisions.

These problems with Congress's structure lend support for presidential initiative. Congress's organization and the nature of foreign affairs (high potential costs and benefits, extreme uncertainty and unpredictability) make the legislature less likely to take a leading role in foreign affairs. Practice, at least since the end of World War II, seems to demonstrate that the political branches have read the constitutional text to establish a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations.<sup>39</sup> Thus, the collective action problems faced by Congress undermine the idea that *ex ante* congressional authorization will improve decision-making about war.

Empirically testing the assertion that greater institutional participation produces more accurate decisions would require us to determine whether congressional participation, *ex ante*, correlates with positive outcomes for war. While a systematic review is outside the scope of this Essay, a quick review of the record does not seem to suggest any connection between success in war—which itself could be the product of good conflict selection or better performance—and congressional *ex ante* approval. Declarations of war generally have marked victories for the United States. The first and second World Wars and the Mexican- and Spanish-American Wars ended with the United States prevailing, and the War of 1812 could be considered a draw. But other wars that ended on an unpopular note, such as Vietnam and perhaps the current Iraq occupation, do not suggest a clear relationship between *ex ante* statutory authorization and American success. These examples are anecdotes, and it remains possible that *ex ante* legislative authorization could help select

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38. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 64-68 (2003).

39. See KOH, *supra* note 5, at 123-33. Even Koh, a leading critic of war powers in practice, acknowledged that the "presidency . . . is ideally structured for the receipt and exercise of power," especially in the foreign affairs context, where its "decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match." *Id.* at 118-19.

the appropriate conflicts; but ultimately this is an empirical question, and it cannot be answered definitively through theoretical models.

### III. THE INTERNATIONAL LEVEL

Part II's analysis suggests that a Congress-first approach to war powers is unlikely to be more effective than the current system in resolving agency slack issues at the domestic level. When we consider the international as well as the domestic level, we see that prior legislative authorization of conflicts can still play an important role. This Part develops a signaling model in which legislative authorization conveys information to a potential opponent about the United States' resolve in a crisis. According to this model, we should want a system that allows the United States to avoid conflicts in which the expected value of war is negative, but that also allows the United States to engage in conflicts in which the expected value of war is positive. An optimal result occurs when the opponent understands costly signals sent by the United States and a settlement is reached. Whether the signal is effective will depend in part on the regime type of the opponent; thus, it seems that sending such a signal should not always be required.

#### *A. Informational Advantages and the Democratic Peace*

Concluding that the President should have the constitutional authority to initiate war is not to say that Congress should always be excluded. On the contrary, the third factor in our analysis—the informational advantages of signaling resolve toward foreign adversaries—suggests otherwise. We propose to apply this factor to a simplified model of why disputes may turn into war. Applying this model to the separation of war powers, we find that Congress can play a beneficial role in authorizing the use of force, under certain conditions.

The model we employ is drawn from two strands in the international relations literature: work on crisis bargaining and investigations into the “democratic peace.” War is costly and risky, so if we assume complete information and sequential rationality, nations should almost always settle disputes through diplomacy rather than through force.<sup>40</sup> To see why this

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40. See James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 379-81 (1995); Robert Powell, *Bargaining Theory and International Conflict*, 5 ANN. REV. POL. SCI. 1 (2002); Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT'L ORG. 233 (1999). We have separately

would be so, assume nation *A* seeks to challenge nation *B* over a good, whether it be territory, a trading relationship, or other asset. After *A* issues the challenge, accompanied by some type of threat, *B* decides whether to respond by either resisting or relinquishing the asset. If *B* chooses the latter, the game ends. If *B* chooses the former, *A* backs down, ending the game, or *A* makes good on its threat and war ensues.

While war may allow either *A* or *B* to control the asset, the outcome of war is not certain. *A* and *B* each has its own expected value of war, which is the probability that it will prevail, times the value of the asset, minus the expected cost of war. If both of these expected values are known to *A* and *B*, then no war should result. For instance, if *A* threatens to use force if it does not receive the asset, but *B* knows that the cost of war to *A* is greater than the expected value of the asset (in other words, the expected value of war to *A* is less than zero), then *B* knows *A* will not go to war. *B* will resist, and *A* will stand down. If *B* knows that *A*'s expected value of war is greater than zero, then *B* will back down by transferring the asset or seeking a negotiated compromise. Whether *B* resists or transfers the asset, a peaceful result obtains. Thus, in a world of perfect information, the asset will end up in the hands of the party that has a positive expected value of war, with the only change being the distribution of wealth.

There are three assumptions that underlie this result. First, we assume that there is a real probability that either *A* or *B* will win. If the states are rational and they know this probability exists, then they should reach a negotiated settlement. Second, we assume that *A* and *B* are not risk-seeking; they would rather accept a negotiated settlement than gamble to achieve a low-probability outcome. Third, we assume that the asset is amenable to bargaining; its value is continuous and can be divided, unlike the value of a single unit, which must be transferred as a whole. Even this last assumption might not be such a problem if states can make side payments or link deals together to reach the desired level of compensation in a bargain.

Incorporating "audience costs" changes the analysis somewhat. Following Fearon and Schultz, we can define audience costs as the costs incurred by a regime when it makes a threat to use force but fails to carry it out.<sup>41</sup> Thus, *A* will carry out its threat if *A*'s expected value of war is greater than the audience

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applied the literature on noncooperative bargaining in international crises to the study of war powers. See Nzelibe, *supra* note 27; John C. Yoo & Will Trachman, *Less Than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379, 386-88 (2005).

41. James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68, 69 (1997); Schultz, *supra* note 40, at 241.



costs. *B* will concede only if this is true, but will resist if *A*'s expected value is less than its audience costs. If *B* resists under this condition, then *A* will withdraw its threat and no concession is made. Again, either course of action produces a peaceful result; the only difference is whether *A* comes to possess the asset or *B* retains it.

Incomplete information, however, produces the possibility for war, even if both *A* and *B* act rationally. In a world of incomplete information *A* does not know *B*'s expected value, and vice versa. Even if both may agree on the valuation of the asset, they do not know the other's estimate as to its probability of prevailing in a conflict. *A* and *B* may have private information about their own political and military capabilities that, if known to the other side, would change their estimate of the probability of winning.

War results from a failure to disclose private information. First, states will not have complete information on factors that will affect the military outcome. *B* may not know, for example, that *A* has the ability to engage in large scale repositioning of mobile armor forces that would allow it to conduct a war of maneuver. Second, states without complete information may incorrectly estimate each other's willingness to go to war. Third, incomplete information creates the possibility that states may bluff. And even if both states could avoid war by not bluffing, bluffing also presents the possibility that *A* or *B* could do better than their relative power positions would allow if both states had complete information. While the high cost of modern war may encourage states to avoid war, it may also have the perverse effect of encouraging them to bluff about their willingness to fight in order to get a better deal.<sup>42</sup>

The democratic peace thesis enters this analysis by turning the focus to questions of domestic institutional structure. One empirical finding that is accepted by most scholars of international relations is that democracies do not go to war with each other.<sup>43</sup> The statistical evidence appears to be quite robust, and extensive testing indicates that the relationship between democracies and peace is sound.<sup>44</sup> Related corollaries of this basic finding include the observation that democracies go to war regularly with autocracies;<sup>45</sup> that democracies win a high percentage of their wars with nondemocracies;<sup>46</sup> and

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42. James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 578 (1994).

43. RUSSETT, *supra* note 7.

44. Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624, 628-32 (1993).

45. See Maoz & Abdolali, *supra* note 7, at 23.

46. REITER & STAM, *supra* note 7; Lake, *supra* note 7, at 30. But see Desch, *supra* note 7.

that democracies are more likely to initiate wars against autocracies than vice versa.<sup>47</sup> Democracies are not inherently peaceful; they have waged aggressive wars, attacked weaker neighbors, and have sought to build empires. They simply do not wage war against each other.

Scholars have proposed two different theories, within the rational choice context, to explain this. One approach, “the institutional constraints” model, argues that democratic regimes are institutionally constrained in their ability to choose and pursue wars. Democracies have opposition parties; if the majority party undertakes a war that goes badly, it is turned out of office. Due to their fear of losing, democracies are more selective about the wars they choose to enter, and they commit more resources to avoid defeat.<sup>48</sup> Democracies have lower expected values for war because they hold lower estimates of their probability of winning and higher estimates for the expected cost of war.

A second theory holds that democracies enjoy informational advantages in war. Democracies can reach bargains in the face of imperfect information more readily than nondemocracies. One way a state can credibly reveal private information is to send costly signals. A state can signal its willingness to fight – and thus its expected value of going to war – by incurring a cost that it would otherwise avoid if it were not willing to go to war.<sup>49</sup> A democratic state, for example, can incur high audience costs by making a public threat that, if unfulfilled, will lead to the downfall of the government. The more that elected leaders make such threats, the more they incur audience costs that indicate that they will use force if their demands are not met. Threats that represent the unified actions of the legislature and the executive branch will signal greater resolve than the decision of the executive or legislature acting alone.

It may be difficult to test which theory better accounts for the data, since both theories yield overlapping predictions. One empirical study, however, claims that the informational model is more promising. Using the Correlates of War database, Kenneth Schultz examined all militarized international disputes from 1816 to 1980 and asked whether the presence of a democratic challenger (our state *A*) made a difference in the response of the defender (our state *B*).<sup>50</sup> If the institutional constraints theory about democracies held true, we would expect defenders to resist at a higher rate because democracies under this theory would generally have a lower expected value for war. If the

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47. James Lee Ray, *Integrating Levels of Analysis in World Politics*, 13 J. THEORETICAL POL. 355, 376 n.22 (2001). Ray, however, notes that this correlation is not statistically significant. *Id.*

48. Bueno de Mesquita et al., *supra* note 7, at 799–801.

49. Schultz, *supra* note 40, at 241.

50. *Id.* at 249–56.

informational theory were superior, we would expect defenders to concede more often when the challenger was a democracy because democracy allows challengers to more effectively communicate their willingness to use force. The results of Schultz's study offer some support for the informational theory.

*B. Legislative Authorization as Costly Signaling*

Our rational choice approach to crisis bargaining shows that Congress can play a beneficial role in authorizing the use of force, under certain conditions. If the President goes to Congress for approval of military hostilities before or in the middle of an international crisis, he must consume political capital. He must reveal some private information to Congress about the factual circumstances of the crisis and military plans and strategies. Finally, the President generates substantial audience costs by making a political commitment to use force if certain circumstances are not met.

The nature of the authorization impacts the amount and nature of the audience costs. Compare, for example, the legislation to use force after the September 11 attacks and the Iraq War. Within a week after September 11, Congress passed a resolution giving the President wide latitude to use force against any nation, organization, or person involved in the attacks.<sup>51</sup> However, when Congress enacted the statute on September 18, the United States was not yet engaged in crisis bargaining with another nation. To be sure, the statute did signal that the United States might use force to hold the supporters of the September 11 attacks to account, but at the same time the value of that signal may have been reduced because it did not occur in the context of dispute bargaining. A few weeks later, the United States traced the attacks to the al Qaeda terrorist organization and at that point demanded that Afghanistan hand over the organization's leaders. Congressional authorization to use force would likely have had greater effect at that point in signaling to Afghanistan's leaders America's expected value of war.

Congressional participation during the lead-up to the war in Iraq was likely more effective as a signal. President Bush went to Congress for authorization for the use of force against Iraq in the midst of an escalating public and diplomatic campaign to force Iraq to relinquish any weapons of mass destruction and to obey United Nations Security Council resolutions seeking to

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51. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

end Iraq's aggressive actions against its neighbors.<sup>52</sup> Congress subsequently passed a statute authorizing the President to use force to "defend the national security of the United States against the continuing threat posed by Iraq," and to "enforce all relevant United Nations Security Council resolutions regarding Iraq."<sup>53</sup>

Congress's participation was part of a series of signals sent by the United States to Iraq to convince it to give up its WMD capabilities. It was a costly signal, at least more costly than the speeches that preceded it, because it required President Bush to go to Capitol Hill for support, to reveal information to Congress about the Iraq situation, and to place the prestige and credibility of his administration on the line. If the United States had decided against using force in the face of Iraq's refusal to accede to American demands, President Bush would have suffered significant political costs. Seeking congressional authorization provided the United States with an additional mechanism to signal its willingness to use force, and thereby reveal some private information about its expected value of war.

Congressional participation might play an equal, if not greater, role in ending a crisis peacefully. As noted earlier, failures in bargaining that lead to war can arise from private information that is not revealed publicly. Another failure in bargaining could arise from a commitment failure. Two nations in an international dispute may come to an agreement on an outcome that both sides prefer to war. They cannot, however, credibly commit that they will implement the agreement because one or both nations will have an incentive to cheat if there is no supranational enforcement agency. In other words, the nations suffer from a prisoner's dilemma. Congressional participation at the end of an international confrontation can provide a means for Presidents to engage in meaningful commitments to keep a bargain. The President could, for example, seek legislation that would eliminate funding for a weapon system to comply with an arms control agreement. Congress could have eliminated money for Pershing missiles after the United States and the Soviet Union signed the Intermediate Range Nuclear Forces treaty. While Presidents could not make absolute guarantees about the conduct of future Presidents and Congress, breaking these commitments would require legislative participation and would at least be public.

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52. These events are recounted in John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

53. Authorization for Use of Military Force Against Iraq Resolution of 2002, § 3(a)(1)-(2), Pub. L. No. 107-243, 116 Stat. 1498, 1501.

Finally, congressional participation can provide other forms of signals, especially those that depend on sunk costs. Generally, politicians can convey two distinct kinds of signals to a foreign adversary during an international crisis: "sunk costs" and "tying hands."<sup>54</sup> Seeking legislative authorization prior to the use of force is a tying hands signal because politicians face domestic political costs if they issue a threat to use force and fail to make good on the threat. Such signals can be destabilizing because they reduce a nation's flexibility to pull back from war in the event that the opposing nation does not meet its demands. Sunk cost signaling is more costly *ex ante*, but leads to greater *ex post* stability. For example, increasing military spending and long-term deployments to prepare for a conflict is more expensive than simply issuing a threat. Such costs are "sunk" because they are spent even if there is no conflict. States that engage in sunk cost signaling, however, will have lower *ex post* costs because they will incur fewer additional costs if they choose not to go to war. They can more easily avoid the use of force because they have made no commitments to domestic political audiences. This analysis suggests that seeking legislative cooperation through funding, especially over the long term, will generally lead to greater *ex post* stability than a constitutional system that places its emphasis on declarations of war or statutory authorizations for the use of force.

### *C. Regime Types and the Varying Value of Costly Signals*

This Section addresses a factor that often goes unexamined in arguments supporting congressional participation in war: the costs. We can understand the costs by asking whether the signaling value of congressional authorization varies with the regime type of an opposing nation. If it does, then a rule that Presidents must seek congressional permission ought to vary as well.

The non-cooperative bargaining model of international conflict assumes that the actors of concern are rational, self-interested nation-states. Recent developments in the international system may require that we relax this assumption. Taking rogue states or international terrorist organizations such as al Qaeda into account may distinguish cases in which the benefits of signaling do not outweigh the benefits of executive speed, secrecy, and flexibility. Threats to American national security now come not only from the hostile intentions of other nation-states, but from three other sources: the easy availability of the knowledge and technology to create weapons of mass destruction; the emergence of rogue nations; and the rise of international

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54. See Fearon, *supra* note 41, at 69-70.

terrorism of the kind practiced by the al Qaeda terrorist organization.<sup>55</sup> The al Qaeda terrorist network and similar organizations may pose a threat that does not lend itself to resolution through bargaining.<sup>56</sup> In particular, signaling may prove ineffective when applied against these nations or groups because they are unlikely to have the proper incentives to respond to the information conveyed by such signals.

Significantly, the informational value of the signaling mechanism among democracies depends heavily on the existence of transparency and domestic political accountability, both of which are usually lacking in terrorist organizations and rogue states. In a sense, the very logic of the signaling mechanism assumes that because democracies are aware that other democracies are less likely to back down in an escalating international crisis, democracies will be less reluctant to get involved in wars against each other in the first place.<sup>57</sup>

On the other hand, because rogue states and terrorist organizations face little or no political accountability for their foreign policy failures, they can afford to ignore their domestic audiences and take more aggressive stances in initiating international conflicts.<sup>58</sup> Conversely, once they enter into an escalating international crisis, rogue states can more easily afford to back out of the crisis without paying a political price for seeming inconsistent or weak. In sum, the crisis bargaining model suggests that rogue states are neither likely to signal credible commitments of their resolve in an international crisis, nor likely to appreciate costly signals made by other states.

The existing empirical evidence largely supports the view that rogue or autocratic states are much more willing to discount the risks of military failure than democracies. For instance, Bruce Bueno de Mesquita and Randolph Siverson have shown that democratic regimes tend to initiate conflicts of lower

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55. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

56. Terrorist groups like al Qaeda seek to acquire WMDs, are more likely to use them, and—because they have no population or territory to defend—may be immune to “traditional concepts of deterrence” that permeate the crisis bargaining model. See NAT’L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

57. See Fearon, *supra* note 42, at 580; see also Bruce Bueno de Mesquita & Randolph M. Siverson, *Nasty or Nice?: Political Systems, Endogenous Norms, and the Treatment of Adversaries*, 41 J. CONFLICT RESOL. 175, 180 (1997).

58. See Dan Reiter & Allan C. Stam III, *Democracy, War Initiation, and Victory*, 92 AM. POL. SCI. REV. 377, 378 (1998) (arguing that nondemocracies will tend to pursue more belligerent foreign policies because of the lack of electoral accountability).

risk than nondemocracies,<sup>59</sup> and other studies have shown that they also tend to suffer fewer battle deaths and fight much shorter wars.<sup>60</sup> In sum, these studies strongly suggest that democracies tend to be much more cautious in the kinds of wars they fight; an obvious corollary is that democracies are more likely to be sensitive to signals that relay information about the willingness of a foreign adversary to engage in a high-risk conflict.

A related argument is that because democracies tend to benefit from a more robust marketplace of ideas and information than nondemocracies,<sup>61</sup> they are better able to understand the institutional context in which the President and Congress interact on war powers issues. Even if terrorist organizations or rogue states did understand the meaning of legislative signals, however, common ground that could produce a bargain might still be absent. Al Qaeda demanded, for example, that the United States withdraw from the Middle East and cease its support of moderate Arab regimes and of Israel, and that a fundamentalist Islamic caliphate replace those regimes.<sup>62</sup> Assuming that the United States will not alter its foreign policy in such a dramatic fashion, there is no possibility of a bargain.

The declining value of costly signals is counterbalanced by the benefit of using preemptive force against terrorists and rogue states. As September 11 showed, terrorist attacks can occur without warning because their unconventional nature allows their preparation to be concealed within the normal activities of civilian life. Terrorists have no territory or regular armed forces from which to detect signs of an impending attack. To defend itself from such an enemy, the United States might need to use force earlier and more often than was the norm during a time when nation-states generated the primary threats to American national security.<sup>63</sup>

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59. See Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Study of Regime Types and Political Accountability*, 89 AM. POL. SCI. REV. 841, 852 (1995).

60. See D. Scott Bennett & Allan C. Stam III, *The Duration of Interstate Wars, 1816–1985*, 90 AM. POL. SCI. REV. 239, 253 (1996) (showing that democracies tend to fight shorter wars); Randolph M. Siverson, *Democracies and War Participation: In Defense of the Institutional Constraints Argument*, 1 EUR. J. INT'L REL. 481, 486 (1995) (“[W]ars initiated by democratic leaders are significantly less lethal than wars initiated by non-democratic leaders . . .”).

61. For the general argument that democracies tend to possess better information about the risks of wars than nondemocracies, see Reiter & Stam, *supra* note 58, at 378–79.

62. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 50–55 (2004).

63. See Marc Trachtenberg, *Preventive War and U.S. Foreign Policy* (Dec. 28, 2005) (unpublished manuscript, on file with authors); see also Yoo, *supra* note 55, at 734–35.

As with terrorism, the threat posed by rogue nations may again require the United States to use force earlier and more often than it would like.<sup>64</sup> Rogue nations may very well be immune to pressure short of force designed to stop their quest for WMD or their threat to the United States. Rogue nations, for example, have isolated themselves from the international system, are less integrated into the international political economy, and repress their own populations. This makes them less susceptible to diplomatic or other means of resolving disputes short of force, such as economic sanctions. Lack of concern for their own civilian populations renders the dictatorships that often govern rogue nations more resistant to deterrence. North Korea, for example, appears to have continued its development of nuclear weapons despite years of diplomatic measures to change its course.<sup>65</sup>

These new threats to American national security change the way we think about the relationship between the process and substance of the warmaking system. The international system as it existed at the end of the Cold War allowed the United States to choose a warmaking system that could have placed a premium on deliberation and the approval of multiple institutions, whether for purposes of political consensus (and hence institutional constraints that lower the expected value of war) or for purposes of signaling private information in the interests of reaching a peaceful bargain. If, however, the nature of threats has changed and the level of threats has increased, and military force is the most effective means for responding to those threats, then it may make more sense for the United States to use force preemptively. Given the threats posed by WMD proliferation, rogue nations, and international terrorism, at the very least it seems clear that we should not adopt a warmaking process that contains a built-in presumption *against* using force abroad or that requires long and deliberate procedures.

These developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past. In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the executive branch needs the flexibility to act quickly, possibly in situations in which congressional consent cannot be obtained in time to act on the intelligence.

These cases suggest that a permanent constitutional rule requiring congressional permission to use force would be over-inclusive. In certain situations, particularly when the United States is facing a nation-state with a

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64. See Yoo, *supra* note 55, at 751-53.

65. See, e.g., *North Korea Is Defiant over U.N. Council Nuclear Resolution*, N.Y. TIMES, July 17, 2006, at A4.



similar political system or one that can draw on a sophisticated understanding of foreign nations, signaling through congressional participation may prove valuable. But costly signals may prove ineffective in other situations, particularly when the opponent is a rogue state or an international terrorist organization. There may be little value in revealing private information through legislative commitments if the opponent does not understand the meaning of congressional participation or does not share a common value system that would allow a bargain to be struck. In other words, the signaling model that underwrites the value of congressional participation breaks down when confronted with these opponents. In such cases, we might conclude that the benefits of swift, even preemptive military action might outweigh the potential effectiveness of signaling. These considerations suggest that a two-tier approach to war powers might be desirable, in which conflicts with similar nation-states should involve congressional authorization, which can only assist the executive branch in reaching a bargain with a foreign nation. But if the opponent is a terrorist organization or a rogue nation, the United States might be better off retaining a system of executive initiative in war.

We should make an important clarification. Our argument does not preclude the possibility that some nondemocratic regimes could understand the informational value of legislative signaling, but it assumes that democratic regimes are more likely to appreciate such signals. In some circumstances, the President might seek legislative authorization for the use of force against nondemocratic states to improve the chances of a peaceful settlement. But it will depend on the circumstances and on whether the benefits of such a signal would be outweighed by the costs of delay. We believe that the President is best suited, as a structural matter, to determine whether to seek to signal a nondemocratic regime with legislative authorization.

#### *D. The Dangers of Judicial Intervention*

Faced with the prospect that congressional participation can sometimes play a salutary role in avoiding unnecessary wars, an antecedent question naturally arises. Should the courts decide if such a congressional role would be appropriate? Indeed, a recurring theme running through much of the Congress-first literature is that judicial intervention is necessary to vindicate the congressional role in initiating conflicts.<sup>66</sup> But if one accepts the signaling model developed here, there are significant reasons why one ought to be wary of a judicial role in resolving war powers controversies.

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66. See ELY, *supra* note 5, at 54-67.

First, under our model of international crisis bargaining, judicial review would likely undermine the value of signals sent by the President when he seeks legislative authorization to go to war. In other words, it is the fact that the signal is both costly and discretionary that often makes it valuable. Once one understands that regime characteristics can influence the informational value of signaling,<sup>67</sup> it makes sense that the President should have the maximum flexibility to choose less costly signals when dealing with rogue states or terrorist organizations. The alternative—a judicial rule that mandates costly signals in all circumstances, even when such signals have little or no informational value to the foreign adversary—would dilute the overall value of such signals.

Second, judicial review would preclude the possibility of beneficial bargaining between the President and Congress by forcing warmaking into a procedural straitjacket. In this picture, judicial review would constrain the political branches to adopt only the tying hands type of signal regardless of the nature or stage of an international crisis.<sup>68</sup> But the supposed restraining effect attributed to the tying hands signal can vary considerably depending on whether the democracy is deciding to initiate an international crisis or is already in the midst of an escalating crisis. Requiring legislative authorization may make it less likely that the democracy will be willing to back out of a conflict once it starts.<sup>69</sup> Thus, tying hand signals and judicial insistence that the President seek legislative authorization will contribute to greater international instability once a conflict has already started.

Thus far, our argument presupposes that there are only two institutional models of judicial review from which to choose: a judicial approach that mandates legislative authorization for all conflicts and a hands-off judicial approach that gives the President wide latitude to decide if such costly signaling would be beneficial. But there is a third possibility. The courts could make the initial determination as to whether a foreign adversary is the type that would benefit from costly signaling.<sup>70</sup>

At first blush, such a judicial choice of an interpretive approach might appear to resolve the problem of over-inclusive signaling identified above. But

67. See *supra* Section III.C.

68. See *supra* notes 54–58 and accompanying text (discussing tying hand and sunk costs signals).

69. Cf. ELY, *supra* note 5, at 54–67.

70. Indeed, Anne-Marie Slaughter has advocated such a judicial role in discriminating between democratic and autocratic regimes in the context of the application of the political question doctrine. Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 2003 (1993) (reviewing THOMAS M. FRANC, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)).

here the objection to judicial review would be on institutional competence grounds. Simply put, it would take a leap of faith to believe that courts would be able to discern correctly the regime type of a foreign adversary and decide whether legislative participation would prove to be valuable in any specific war. Of course, courts sometimes make case-by-case judgments about factual predicates in other contexts, but decisions about the signaling value of legislative authorization would not only require access to possibly classified information about foreign threats but also the resources to analyze such threats—information and resources that courts clearly lack. Nor can one assume that all democratic regimes will behave alike in their proclivity to initiate or reciprocate hostility. For instance, the President might conclude that although a foreign adversary is nominally a democratic regime, it would not be responsive to costly tying hands signals because it is facing domestic political turmoil.<sup>71</sup> In any event, the judiciary's insulation from the political process makes it particularly ill suited to decide whether the President's decision about the value of signaling in a particular conflict is wrong or not.<sup>72</sup>

#### IV. RESPONSE TO DEAN KOH

Ultimately, our analysis is unlikely to convince those who believe that members of Congress have a moral imperative to always take the lead in initiating wars even if they lack the political will to do so. Indeed, Dean Harold Hongju Koh—a leading Congress-first scholar—has written an essay for this Symposium that takes issue with our claims.<sup>73</sup> Koh's response sets forth some interesting, and rhetorically attractive, claims about presidential power in wartime. But his conclusions are either not directly relevant or rest on

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71. Edward Mansfield and Jack Snyder have argued that although mature democracies do not fight one another, democracies in transition are even more prone to war than authoritarian regimes. See EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005).

72. We and others have elaborated on the courts' lack of institutional competence to resolve a wide range of foreign affairs controversies. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 195-98 (engaging in comparative institutional analysis and concluding that delegation to courts to resolve foreign affairs cases would be inappropriate); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 992-95 (2004) (same); see also Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State,"* 5 EUR. J. INT'L L. 423, 426 (1994); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997).

73. See Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006).

implausible assumptions about political branch behavior. In fact, Koh's response is a good example of the type of war powers discourse—rooted in a normative framework that ignores the political constraints faced by elected officials and the rational interactions of nation-states in bargaining situations—that we are seeking to improve. Strip out the rhetoric, and Koh's response boils down to a repetition of his openly normative views, ungrounded in any persuasive positive account of the operations of the branches of government. Koh suggests that our main theoretical move—which advances a framework for determining when congressional authorization for the use of force might be useful—has been rejected by the Supreme Court's recent decision in *Hamdan v. Rumsfeld*.<sup>74</sup> *Hamdan* focuses on the much narrower question of the scope of the President's power to establish military commissions during wartime consistent with past congressional and judicial acts recognizing them. We simply fail to see how that decision is relevant to understanding how the political branches should interact when deciding to initiate the use of force. More importantly, we neither pretend to advance doctrinal analysis on war powers nor do we purport to predict the future direction of the case law on this issue. Rather, we advance a normative framework rooted in the rational actions, at the domestic level, of members of the political branches and, at the international level, of nation-states during an international crisis.

Koh simply seeks to use *Hamdan* as a rhetorical springboard to promote his longstanding vision of a more assertive Congress in war powers. But over the past century, this vision has collided with the reality that members of Congress face few incentives to take on this politically unpalatable role.<sup>75</sup> Simply put, electoral constraints and collective action problems make it unlikely that members of Congress will meaningfully constrain the President's agenda, especially at the early stages of a conflict when public opinion is likely to be on the President's side. But rather than frame a more realistic normative framework that is rooted in political reality, Koh would have members of Congress sacrifice their rational self-interests in the service of some highly disputed and questionable constitutional objective. As Professor Adrian Vermeule has aptly pointed out elsewhere, “[This] remedy is no more sensible than urging a person to jump over a 10-story building by sheer willpower.”<sup>76</sup>

Koh takes issue with our claim that the value of congressional authorization is likely to vary with the regime type of the foreign adversary. More specifically,

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74. 126 S. Ct. 2749 (2006).

75. See *supra* text accompanying notes 31–39; see also Nzelibe, *supra* note 27, at 1002–12.

76. Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers* (Univ. of Chi., Pub. Law Working Paper No. 122, 2006), available at <http://ssrn.com/abstract=890651>.

he dismisses as “mak[ing] little sense” our proposition that rogue nations and terrorists are likely to have less of an incentive than democratic states to respond to congressional authorizations to use force.<sup>77</sup> Koh does not attempt to support this assertion with any data or theory. He simply relies on his own intuitions about what dictators and terrorists are likely to believe. Significant work on the democratic peace contradicts his guesses. That literature posits that dictators face a different set of incentives than their democratic counterparts during wartime because they are not electorally accountable to a domestic audience.<sup>78</sup> Thus, unlike democratically elected leaders, dictators can more easily afford to ignore signals of resolve sent by democratic adversaries because dictators can remain in power even after they lose wars. Terrorist groups are even more unlikely to subscribe to the kind of crisis bargaining framework that makes signaling useful in disputes among democratic countries.<sup>79</sup>

Unfortunately, Koh does not seriously engage our argument that congressional authorization of the use of force does not necessarily improve democratic accountability or accuracy. Rather, Koh points to the current Iraq conflict as an example against our thesis. It may be true that the President underestimated the costs of the war and provided unreliable intelligence about the existence of weapons of mass destruction to Congress.<sup>80</sup> What Koh does not explain is why Congress—which he has conceded in an earlier work faces institutional constraints against an active role in war<sup>81</sup>—would be motivated to generate its own, superior intelligence or economic forecasts of the costs of war. Nor does he provide any recent examples in which more active congressional involvement in war improved information-gathering and decision-making so as to avoid a war that should not be waged. Koh’s suggestion that Congress can resolve these apparent deficiencies in the President’s conduct of war is ultimately self-defeating because members of

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77. Koh, *supra* note 73, at 2377.

78. See *supra* text accompanying notes 55–61.

79. See *supra* text accompanying notes 55–58; see also Fiona B. Adamson, *Globalisation, Transnational Political Mobilisation, and Networks of Violence*, 18 CAMBRIDGE REV. INT’L AFF. 31, 44 (2005) (observing that transnational networks in weak states tend to “engage in self-help strategies that emphasise the use of violence and force to achieve political objectives, rather than strategies that emphasise institutional channelling, bargaining, and accommodation”).

80. See Koh, *supra* note 73, at 2376–77.

81. See KOH, *supra* note 5, at 117–33 (arguing that the President always wins in foreign affairs because he seizes the initiative and that Congress is unable to stop him because of poor and inadequate legislative tools).

Congress are unlikely to have the incentives to do so. Koh wants to make the perfect the enemy of the good. Our argument is not that the current system or any other system will always be perfect, but that the system we propose yields better results on average than the pure Congress-first approach.

## CONCLUSION

This Essay has sought to introduce a more sophisticated functional perspective to the war powers debate, without focusing on the normative question of what types of war the United States should fight. Previous arguments had raised a conflict between formalism and functionalism. Formalist claims in favor of a requirement that Congress pre-authorize hostilities are no longer as compelling as they once seemed. We believe that the better reading of formalist sources is that the Constitution creates a flexible system for making war. If the formalist debate over war has reached a stalemate, then functionalist arguments only gain in importance.

Functional analysis of war powers, however, has been fairly rudimentary. It has assumed that a Congress-first approach would slow down decision-making regarding war, which would benefit the nation by reducing entry into imprudent wars. This assumption, however, ignores the possibility that Congress might not only reduce Type I errors, but might also increase Type II errors. A casual review of American history does not support the conclusion that congressional participation reduces either Type I or II errors when compared with a system of unilateral presidential initiative in war.

A better functional approach views the war powers question as a principal-agent problem. The executive branch bears certain advantages in terms of speed, unity of purpose, and secrecy in launching wars; while agency costs may certainly arise, it is not clear that congressional participation *ex ante* would significantly reduce them. Congressional participation, however, while unwise to establish as a constitutional rule, may nonetheless benefit the nation in helping it to avoid costly wars. This occurs, however, not because congressional participation slows down the progress toward war, but because it allows the President to engage in costly signaling that could promote a negotiated settlement with a potential enemy. Such a dynamic would not make a significant difference in regard to rogue nations or international terrorist organizations that lack the proper incentives to appreciate such signals or that are uninterested in reaching a settlement. In those cases, the benefits of relying upon executive speed and unity outweigh any benefits that might arise from congressional participation.